1988

State of Utah v. Douglas R. Albretsen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
DOUGLAS R. ALBRETSON,	:	Case No. 880154 Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Aggravated Burglary, a first degree felony, in violation of Utah Code Ann. §76-6-203 (1953 as amended), and Theft, a second degree felony, in violation of Utah Code Ann. §76-6-404 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, Judge, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. §78-2-2(3)(i) (1953 as amended) whereby a defendant in a criminal case may take an appeal to the Supreme Court from a conviction and final judgment involving a conviction of a first degree felony.

STATEMENT OF ISSUES

1. Did the admission into evidence and publication of Mr. Albretson's mug shot deny him a fair trial?

2. Did the failure to grant defense counsel's objection to surprise alibi rebuttal testimony deny Mr. Albretson due process?

TEXTS OF STATUTES AND CONSTITUTIONAL PROVISIONS

Rule 403 of the Utah Rules of Evidence (1983) provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 of the Utah Rules of Evidence (1983) provides:

> Character evidence not admissible to prove conduct; exceptions; other crimes.
>
> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.
>
> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge identity, or absence of mistake or accident.

Utah Code Ann. §77-14-2 (1953 as amended) provides:

> **Alibi--Notice requirements--Witness lists.**
>
> (1) A defendant, whether or not written demand has been made, who intends to offer evidence of an alibi shall, not less than ten days before trial or at such other time as the court may allow, file and serve on the prosecuting attorney a notice, in writing, of his intention to claim alibi. The notice shall contain specific information as to the place where the defendant claims to have been at the time of the alleged offense and, as particularly as is known to the defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish alibi. The prosecuting attorney, not more than five days after receipt of the list provided herein or at such other time as the court may direct, shall file and serve the defendant with the addresses, as particularly as are known to him, of the witnesses the state proposes to offer to contradict or impeach the defendant's alibi evidence.
>
> (2) The defendant and prosecuting attorney shall be under a continuing duty to disclose the names and addresses of additional witnesses which come to the attention of either party after filing their alibi witness lists.
>
> (3) If a defendant or prosecuting attorney fails to comply with the requirements of this section, the court may exclude evidence offered to establish or rebut alibi. However, the defendant may always testify on his own behalf concerning alibi.
>
> (4) The court may, for good cause shown, waive the requirements of this section.

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF THE CASE

This is an appeal from a judgment and conviction for Aggravated Burglary, a first degree felony, in violation of Utah Code Ann. §76-6-203 (1953 as amended), and Theft, a second degree felony, in violation of Utah Code Ann. §76-6-404 (1953 as amended) in accordance with Utah Code Ann. §76-6-412(a)(i) (1953 as amended), following a jury trial held August 4 and 5, 1987, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, Judge, presiding.

STATEMENT OF FACTS

On May 11, 1987, between approximately 5:30 p.m. and 5:45 p.m., Maureen Leavitt returned from work to her home (T. 13-16). After being inside the house for a few minutes, she walked down the hall leading from the family room to the kitchen (T. 34). As she approached the end of the hallway, a man with a club raised in his hand suddenly stepped in front of her from behind a corner (T. 20, 21, 44).

The man was approximately two feet away from Ms. Leavitt, and she saw him for approximately three seconds before she was hit in the head and left unconscious (T. 21, 24, 50).

Ms. Leavitt was subsequently hospitalized for her injuries. After her release, and three days after the incident, Detective Hutchison left a book of pictures with Ms. Leavitt's husband in hopes that Ms. Leavitt could identify her assailant among the pictures (T. 38). Ms. Leavitt looked through the book containing thirty to fifty photos, then stated to her husband, "[t]his looks like the man that beat me" (T. 38-9). The photo Ms. Leavitt selected was that of the defendant, Douglas Albretson (T. 54).

That night, Ms. Leavitt also told Detective Hutchison that the photo looked like the assailant. The next day, Detective Hutchison showed Ms. Leavitt a piece of cardboard with six pictures attached. Ms. Leavitt again selected the photograph of Mr. Albretson (T. 39-40, 55).

On July 22, 1987, Mr. Albretson filed a Notice of Intent to Rely on the Defense of Alibi as required by Utah Code Ann. §77-14-2(1) (1953 as amended). The defendant listed Brenda Davis and Cindy Edwards as alibi witnesses (R. 22). (Addendum A). On July 27, 1987, defendant filed an amended notice which contained a change of address for Brenda Davis (R. 24). (Addendum B). The State filed its Reply to Notice of Alibi on July 30, 1987. In its reply notice, the State listed Officer Brandt Hutchison of the Salt

Lake City Police Department as its only rebuttal witness (R. 49). (Addendum C).

The Court heard defendant's Motion in Limine to exclude evidence of prior convictions on July 29, 1987 (R. 51). The Court sustained defense counsel's objection to Exhibit S-7 (looseleaf binder of photographs) and ordered the alteration of Exhibit S-8 (the six-picture photo spread). Id.

At trial, under direct examination, the prosecutor showed Ms. Leavitt the six-picture photo spread. She testified that Detective Hutchison brought that photo spread to her home after she tentatively selected Mr. Albretson's photograph from the photo book (T. 39-40). The prosecutor asked Ms. Leavitt to place an "x" by the photograph which she selected as her assailant for Detective Hutchison, then moved for admission of the six-picture photo spread as State's Exhibit 8 (T. 39-41). Defense counsel stated that she had "no objection to its admission" but asked that it not be published at that time. The Court admitted the exhibit but did not publish it to the jury (T. 41).

During cross-examination, the following exchange, which represents the entire cross-examination dialogue concerning the photographs, occurred:

> Q. You chose a photograph that resembled the person you remembered seeing at that point; is that correct?
> A. Yes.
> Q. Then you told Det. Hutchison which picture you felt looked like the person?
> A. Yes, I told him, "This looks like the man that beat me."
>
> . . . . .

Q. A day or two later Det. Hutchison brought you the exhibit that I believe is State's No. 8, the photograph exhibit; is that correct?
A. Yes.

. . . . .

Q. And you picked one out?
A. Yes.
Q. Mr. Albretson's picture was in that document, wasn't it?
A. Yes, it was.
Q. And you recognized it?
A. Yes.
Q. It was a picture of the same person, Doug Albretsen, a picture of (sic)?

. . . . .

Q. When you first saw the first photograph in the book of photographs that Det. Hutchison left for you to look at, what is it you said to your husband?
A. I said, "This looks like the man that beat me."
Q. All right. Nothing further.

(T. 54-6).

On direct examination, the prosecutor questioned Ms. Leavitt regarding the differences between the first and second photograph of the man she had identified as her assailant, which photograph appeared to be the more recent, and her reasons for picking the second photograph (T. 56-7). On re-cross-examination, defense counsel directed three questions to Ms. Leavitt, asking if she could discern whether the first and second photographs were of the same man (T. 58).

Following the testimony of another witness, the prosecutor asked outside the presence of the jury that the two photographs Ms. Leavitt selected as her assailant be shown to the jury. The prosecutor told the Court that the numbers and words "Salt Lake County" which were on the photograph taken from the book

had been covered by tape (T. 67).

Defense counsel objected because it was apparent that something on the photograph had been blocked out and, furthermore, that the photographs were "mug shots" and therefore prejudicial evidence of a prior arrest (T. 67-9). The Court overruled the objection and allowed the pictures (front and profile) from the black mug shot book to be introduced as Exhibits S-9 and S-10 (T. 70-1). Again over defense objection, the Court allowed Exhibits S-9 and S-10 to be published to the jury (T. 74).

Based upon the admission and publication of the photographs taken from the black mug shot book, defense counsel made a motion for a mistrial (T. 79-80). The Court denied the motion (T. 81).

As part of its case in chief, the defense called Ms. Brenda Davis, an alibi witness previously identified for the State and the Court in defendant's Notice of Intent to Rely on the Defense of Alibi (R. 22, 24; T. 82). Ms. Davis testified in part that on May 11, 1987, between 11:30 a.m. and 12:30 p.m., she, her son, and Mr. Albretson "went for a ride up into Parley's Way and Emigration Canyon" (T. 95-7).

Prior to trial, the State obtained through Detective Hutchison a written statement from Ms. Davis that she would testify that she and Mr. Albretson drove up Parley's Way and Emigration Canyon (T. 101, 116, 124). (Addendum D). On cross-examination of Ms. Davis, the prosecutor extensively questioned Ms. Davis as to the details of the route taken through Parley's Way and Emigration

Canyon (T. 95-7).

After the defense rested, the prosecutor informed the Court that he intended to present rebuttal testimony but that it would take some time to obtain the witness (T. 114). Following a short recess, the State had not yet located the witness and suggested that the Court take its noon recess, after which time the State would present its rebuttal witness (T. 115).

Defendant made a motion that evidence be closed at that time and pointed out that the defense had not been informed of a rebuttal witness named Mr. Miller with the Department of Transportation and that it was not appropriate for the Court to allow the State to "go find a witness who has not been anticipated and the defense has not been made aware of in an alibi case. . . ." (T. 116). The Court denied the motion and recessed the Court for its noon recess at 11:39 a.m. to reconvene at 1:45 p.m. (T. 117, 119). Defense counsel again objected to the State's proferred rebuttal witness in chambers (T. 120-4).

Following the noon recess, the State presented the testimony of Richard Miller, an employee of the Utah Department of Transportation. Mr. Miller testified that State Road 65 was closed during the time that Ms. Davis testified that she and Mr. Albretson drove through Parley's Way and Emigration Canyon (T. 125-129).

SUMMARY OF THE ARGUMENT

The trial court committed prejudicial error in admitting and publishing a mug shot of Mr. Albretson to the jury. The mug

shot photograph suggested prior criminal activity by the defendant and was inadmissible under Rules 403 and 404(b), Utah Rules of Evidence (1983). The admission and publication of the photograph also violated Mr. Albretson's right to due process under both the federal and state constitutions.

Allowing the State to present a surprise alibi rebuttal witness violated Utah Code Ann. §77-14-2 (1953 as amended) and Mr. Albretson's right to due process. Defense counsel was unable to adequately present her case due to the State's failure to comply with the discovery provisions of the statute.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING AND PUBLISHING A MUG SHOT OF DEFENDANT.

> Police photographs or mug shots have been around for well over a half a century and prosecutors have avoided using them as borne out by the fact that Taylor is the only Mississippi case that we can find where they were introduced into evidence. This case comes on the heels of Taylor. We would point out before the practice becomes widespread, that the use of mug shots except when absolutely necessary, is inviting error. Sloan v. State, 437 So.2d 16, 18 fn.2 (Miss. 1983).

A.

ADMISSION AND PUBLICATION OF THE MUG SHOT WAS INHERENTLY PREJUDICIAL.

In a line of cases beginning in 1979, this Court has maintained limitations on the admissibility of evidence which

establishes or implies other criminal conduct by the defendant. See e.g. State v. Pacheco, 712 P.2d 192 (Utah 1985); State v. Saunders, 699 P.2d 192 (Utah 1985); State v. McCumber, 622 P.2d 738 (Utah 1980); and State v. Gotfrey, 598 P.2d 1325 (Utah 1979). The Court has reached its decisions based on the prohibition in the Rules of Evidence against the use of prior bad acts to prove character (see Pacheco, 712 P.2d at 195[1]) as well as the constitutional guarantee in both the state and federal constitutions of due process and a fair trial for a criminal defendant. (See e.g. McCumber, 722 P.2d at 356; Saunders, 699 P.2d at 741-2; State v. Tarafa, 720 P.2d 1368, 1370 (Utah 1986).)

In Saunders, 699 P.2d at 741, this Court noted the Rules of Evidence are designed to protect against undue prejudice which would be caused by the jury's knowledge of a defendant's other criminal acts.

Rule 404(b) of the Utah Rules of Evidence (1983) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In State v.Bishop, 753 P.2d 439, 496 (Utah 1988) (Zimmerman, J. concurring in the result, joined in part by Stewart, A.C.J. and Durham, J.), Justice Zimmerman discussed the

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[1] Pacheco was decided pursuant to Rule 55 of the former Rules of Evidence. Rule 55 was the predecessor to Rule 404(b) of the Utah Rules of Evidence (1983).

application of Rules 403 and 404 to evidence of other crimes.[2] He pointed out that "[t]he present Utah Rules of Evidence embody . . . [a] long-standing common-law approach to evidence of prior crimes or bad character" which disfavors the use of such evidence during the guilt phase of a trial. Id. He further noted:

> [Rule 404(b)] permits introduction of evidence of prior crimes or bad acts to prove certain facts relevant to pending charges, but only if the evidence is admissible under rule 403, i.e., only if the danger of unfair prejudice does not outweigh the probative value of the evidence. [footnote omitted]

Id.

Rule 403, Utah Rules of Evidence (1983) provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In State v. Holder, 694 P.2d 583 (Utah 1984), this Court reversed the defendant's conviction under Rule 45, the predecessor to Rule 403, because the probative value of evidence of a robbery which occurred twenty minutes prior to the incident charged was substantially outweighed by its prejudicial effect. This Court pointed out:

> The merely cumulative character of the robbery evidence on the element of knowledge and intent regarding the theft charge is significant because it highlights the limited value this evidence has when weighed against the substantial possibility that a jury would be prejudiced

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[2] In State v. Bell, 92 Utah Adv. Rep. 22, 26, 30 (1988), in footnote 22, this Court favorably noted this discussion by Justice Zimmerman in State v. Bishop.

by evidence of Holder's commission of another crime.

Id. at 584.

Article I, sections 7 and 12 of the Utah Constitution and the fifth and fourteenth amendments to the federal constitution guarantee due process and a fair trial to a criminal defendant. In his concurrence in State v. Bishop, Justice Zimmerman pointed out "[l]anguage in some of our cases, such as State v. Saunders and State v. Tarafa, plainly states that permitting the jury to consider otherwise inadmissible bad character evidence for the sole purpose of determining guilt denies a defendant due process in violation of the state and federal constitutions." Bishop, 753 P.2d at 497.

Mug shot evidence which is merely cumulative does not fit within the identity exception of Rule 404(b). The inherently prejudicial nature of such evidence has the effect of suggesting to the jury that the defendant was involved in prior criminal activity and outweighs any minimal probative value. As a result, the admission and publication of such evidence violates both Rules 403 and 404(b), Utah Rules of Evidence (1983) and the defendant's right to due process under the state and federal constitutions.

The issue of whether mug shots are inadmissible in a criminal prosecution due to their prejudicial effect has never been directly decided by this Court.[3] In State v. Owens, 388 P.2d 797

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[3] The paucity of Utah case law dealing with this issue despite the fact that mug shots are commonly utilized in criminal law enforcement may be indicative of a consensus by trial judges and prosecutors that such evidence is inherently prejudicial and therefore rarely admitted in a criminal trial.

(Utah 1964), the defendant claimed that the trial court erred in admitting testimony "concerning the presentation by police to [a witness] of 'mug' shots and [the witness] identification of the appellant in one of these pictures." Id. at 797. In Owens, defense counsel did not object to the admissibility of the "mug" shots, and the Court appeared to rule on the admissibility of the witness' prior identification rather than the admissibility of the "mug" shots themselves.

A careful reading of Owens does not show the Court condoning the use of mug shots nor determining their admissibility under the predecessor to Rule 404(b). The Owens court relied upon State v. Aguirre, 158 Cal.App.2d 304, 322 P.2d 478 (Cal. App. 1958) which held that a witness who identified a defendant at trial could testify as to her prior identification of the defendant at a lineup and from photographs. Id. at 798, fn 1.

Utah cases citing Owens do not refer to it in regard to the admission of "mug" shot photographs; instead, cases which cite Owens rely on its holding that evidence of prior identification is admissible. See e.g., State v. Jiron, 492 P.2d 983 (Utah 1972).

In State v. McCardell, 652 P.2d 942, 945 (Utah 1982), the defendant claimed that he was denied a fair trial where the trial court admitted "mug" shots as evidence. This Court noted that "McCardell's arguments on this point clearly have merit" (Id. at 946) but did not address the issue due to counsel's failure to make a specific objection.

In the present case, the prosecutor attempted to introduce and publish the "mug" shot book and "mug" shot of Mr. Albretson on the grounds that the evidence was necessary to demonstrate the difference between Mr. Albretson's in-person appearance with that of the "mug" shot (T. 68-70). However, an argument that Mr. Albretson's mug shot was admissible under the rubric of the identity language of Rule 404(b) is not convincing since Ms. Leavitt made a positive in-court identification of Mr. Albretson.

In Commonwealth v. Trowery, 235 A.2d 171 (Pa. Super., 1967), the state made a similar argument to the Superior Court of Pennsylvania. In Trowery, a witness to a bank robbery identified the defendant after an examination of photographs from police records. Over defendant's objection, his photographs were admitted into evidence. The Court, first noting that it is "almost too axiomatic to repeat the well-established common law rule that . . . proof which shows or tends to show that the accused is guilty of the commission of other crimes . . . at other times is incompetent and inadmissible for . . . showing the commission of the particular crime charged," (Id.) analyzed the admission of the mug shot for purposes of identification in the following passage:

> The Commonwealth argues that this evidence is not adduced to show the commission of the particular crime charged, but merely for the purpose of identification, and therefore its admission does not constitute reversible error. This argument weakens rather than strengthens the Commonwealth's case, for in a real sense evidence of prior crimes may have probative value in proving the commission of the crime charged, but is excluded because the

> prejudice stemming from its introduction far overshadows that value. In a case where the evidence is introduced merely for the purpose of identification, most of the probative value of the evidence is lost while the prejudicial effect remains undiminished.

Id. at 172-3.

In State v. Kutzen, 620 P.2d 258 (Hawaii App. 1980), the court held that admission of the defendant's "mug" shots was reversible error and observed that "the admission of the photographs into evidence after [the witness] made an unequivocal in-court identification of the defendants was unnecessary." Id. at 263.

In the instant case, the analysis by the Pennsylvania and Hawaii courts is particularly compelling. Ms. Leavitt testified that she positively and immediately identified the defendant as her assailant from the photo spread, State's Exhibit 8. Ms. Leavitt further made a positive in-court identification of the defendant. Hence, the highly prejudicial "mug" shot evidence was cumulative and had no probative value in determining whether Mr. Albretson was, in fact, the person who committed the burglary in this case. It therefore was not necessary to prove identity and was inadmissible under Rule 404(b).

The mug shot evidence was also inadmissible under Rule 403. As was the case in Holder, the evidence in the present case was "merely cumulative" and any minimal probative value was substantially outweighed by the prejudicial effect of the implication conveyed by the mug shot that Mr. Albretson had been involved in prior criminal activity.

Furthermore, the mug shot evidence constituted bad character evidence which permeated the entire proceeding. The bad character evidence was cumulative and unnecessary for the State's case and introduced solely to establish guilt, in violation of due process.

The jury's perception of Mr. Albretson was particularly important in this case where he raised an alibi defense (R. 22, 24) and where the State's case rested on the identification testimony of a single witness who viewed her assailant for only three seconds before becoming unconscious. The mug shots suggested to the jury that Mr. Albretson had been involved in criminal activity, thereby tainting the jury's view of Mr. Albretson and his defense. Absent the damaging mug shot evidence, there is a reasonable likelihood the jury would have reached a different decision in the instant case and concluded that Ms. Leavitt made an incorrect identification of the defendant.

B.

PROCEDURES UTILIZED BY THE COURT TO MINIMIZE THE PREJUDICIAL EFFECTS OF ADMITTING AND PUBLISHING THE DEFENDANT'S MUG SHOT WERE INEFFECTIVE.

In recognition of the inherent prejudice of mug shot photos, the trial court in the present case granted defendant's motion in limine to exclude his mug shot from evidence (R. 51). However, in the immediacy of the trial setting and over defense counsel's objection, the Court allowed the introduction and publication of the defendant's mug shot with its legends masked by

tape (T. 67 and 72). Masking the legends of a double-shot, front and profile mug shot of the defendant with tape did not mask the nature of the photos nor their prejudicial effect from the mind of a juror. See Barnes v. U.S., 365 F.2d 509, 510-11 (D.C. Cir. 1966).

The Colorado Supreme Court has criticized the use of double-shot front and profile mug shots even where they have been doctored to exclude information because they "necessarily import prior criminality to the defendant . . . " (People v. Burgarin, 507 P.2d 879 (Colo. 1973)).

Illustrative of the conspicuous and distinctive appearance of the mug shot photo is an exchange between the trial judge and defense counsel as recorded in Richardson v. State, 536 S.W.2d 221 (Tex. Crim. App. 1976). Defense counsel requested that the trial judge excise the legend on defendant's mug shot before admitting it into evidence. The judge refused, responding, "No, sir; with that (the legend) on there. There is no way that I can keep a mug shot from looking like a mug shot. I can cut them in two and trim it, but a mug shot looks like a mug shot." Id. at 222.

The D.C. Circuit Court has emphasized the universally recognized characteristics of the mug shot and the accompanying inference of criminal activity. In Barnes v. U.S., 365 F.2d 509 (D.C. Cir. 1966), the Court commented: "The double-shot picture, with front and profile shots alongside each other, is so familiar, from 'wanted' posters in the post office, motion pictures and television, that the inference that the person involved has a criminal record, or has at least been in trouble with the police, is

natural, perhaps automatic." Id. at 510-11.

Furthermore, in Barnes, as in the instant case, tape was placed over the legends on the mug shot photo before its admission into evidence. The Court, in a particularly relevant passage, pointed out that:

> The rudimentary tape cover placed over the prison numbers on the photograph, and over the notations on the reverse side, neither disguised the nature of the picture nor avoided the prejudice. If anything, by emphasizing that something was being hidden, the steps taken here to disguise the nature of the picture may well have heightened the importance of the picture and the prejudice in the minds of the jury. (Emphasis added.)

Id.

In a memorandum decision, the New York Supreme Court likewise held that tape over the mug shot legend more probably heightened rather than lessened prejudice in the minds of the jury. In People v. Carroll, 402 N.Y.S.2d 8 (N.Y. 1978), the Court wrote that "[w]hile the prison numerals across defendant's chest were taped over in the photographs, this could have had the effect of emphasizing their nature rather than ameliorating the problem." Id. at 8-9.

Further still, in a case where the trial court deleted the legend on the frontal view of the mug shot (the legend on the profile view was left alone since it was seemingly difficult to read), the appellate court reversed the defendant's conviction notwithstanding defense counsel's consent to admission of the mug shots and a subsequent failure to raise a claim of error in admitting the mug shots in a motion for a new trial. In People v.

Clark, 297 N.E.2d 395 (Ill. App. 1973), the Court reasoned that:

> [I]n fact, an examination of the mug shots after the deletion could only lead the jury to speculate as to what information the deleted portion of the photograph had contained. The prejudicial effect of such evidence is of such magnitude as to overcome any relevancy or probative value that it may have had. (Emphasis added.)

Id. at 397.

The case law represented above recognizes that the configuration of a mug shot is distinct and readily identifiable as such and that the procedures utilized by the trial court did not minimize the prejudicial effects of the mug shot. Indeed, not only was prejudice not minimized by the Court's actions, but prejudice was very likely to have been exacerbated. Placing tape over the legends imprinted on the profile and frontal double-shot of the defendant does not obviate the fact that the photo is a mug shot.

Nor did the masking suggest that the mug shot was taken incident to the offense for which Mr. Albretson was before the Court. On the contrary, the photo itself, as well as testimony elicited by the prosecution, predated the mug shot as to the instant offense, thereby suggesting to the jury prior criminal activity by the defendant, thus violating Rules 403 and 404(b), Utah Rules of Evidence (1983) and Mr. Albretson's fundamental right to due process and a fair trial.

C.

ADMISSION INTO EVIDENCE AND PUBLICATION OF THE DEFENDANT'S MUG SHOT CONSTITUTES PREJUDICIAL ERROR.

The admission into evidence and publication of the defendant's mug shot constitutes reversible error. In this case, where no physical evidence existed and the State's case hinged on the identification by a single witness who saw the perpetrator for less than three seconds before being knocked unconscious, the jury's perception of the defendant was critical. The mug shot suggested prior criminal conduct by Mr. Albretson, negatively impacting on the jury's perception of him and its determination as to his propensity to commit crime and the credibility of his alibi defense.

Although Utah has not dealt directly with the instant issue, it has found comparable errors where the jury has been informed of other criminal activity by the defendant to be reversible. See e.g. State v. Saunders. Furthermore, courts in other jurisdictions have found errors similar to that in the instant case to be reversible.

In State v. Kutzen, 620 P.2d 259 (Hawaii App. 1980), the admission into evidence of photos consisting of double-shot frontal and profile views of each defendant, with white paper folded and stapled over the lower portion of the photos, constituted reversible error where the State's entire case relied on the identification of one eyewitness.

In Johnson v. Commonwealth, 345 S.E.2d 303 (Va. App. 1986), the admission into evidence of defendant's mug shot was found

to be reversible error. While the Court noted that it was not error to admit the photo when there exists a defense of misidentification and the State demonstrates a need to introduce the photo, two further criteria must be met as enunciated by the Court in United States v. Harrington, 490 F.2d 487 (2d Cir. 1973) (see also State v. Tate, 341 S.E.2d 380 (S.C. 1986); Sloane v. State, 437 So.2d 16 (Miss. 1983)). Those criteria are (1) the photographs themselves must not imply a prior criminal record and (2) the manner of introduction must not draw particular attention to the source or implications of the photographs. In Johnson, the Court held that reversible error existed because the mug shot legend would alert a member of the jury as to the nature of the photo and its implications. 345 S.E.2d at 308.

An analysis of the instant case would similarly warrant reversal under the Harrington test. (1) The prosecutor failed to establish a need for the introduction of the photo, (2) the photo of the defendant was unmistakably a mug shot, and (3) such information was reinforced by the photo itself and the testimony elicited by the prosecution as to its source.

In State v. Moore, 495 P.2d 448 (Ariz. 1972), the Arizona Supreme Court held that the verbalization of "mug shot" when referring to a photograph was reversible error as an implication of prior criminal activity. The Moore court further approved a previous Arizona Court of Appeals decision which held as prejudicial error the admission of a mug shot where the legend was removed but consisted of a double-shot frontal and profile photo. State v.

Cumbo, 451 P.2d 333 (Ariz. App. 1969).

In a memorandum decision in People v. Carroll, 402 N.Y.S.2d 8 (N.Y. 1978), admission into evidence of a mug shot with the legends taped over constituted reversible error. Reversible error also existed in People v. Clark, 297 N.E.2d 395 (Ill. App. 1973), where the photo was clearly shown not to have been taken as a result of the charge for which defendant was being tried. And in Commonwealth v. Trowery, 235 A.2d 171 (Pa. Super. 1967), reversible error was found when a mug shot of the defendant was admitted into evidence for the purpose of identification.

In the instant case, it was prejudicial error to allow defendant's mug shot into evidence because it suggested to the jury that the defendant had been involved in prior criminal conduct. Because there is a reasonable likelihood the jury would have reached a different conclusion absent the mug shot evidence, the defendant's conviction should be reversed and the case remanded for a new trial.

POINT II

FAILURE TO GRANT THE DEFENDANT'S OBJECTION TO STATE'S SURPRISE ALIBI REBUTTAL WITNESS VIOLATED UTAH CODE ANN. §77-14-2 AND DENIED DEFENDANT DUE PROCESS.

Utah Code Ann. §77-14-2(1953 as amended) provides:

> 77-14-2. Alibi--Notice requirements--Witness lists. (1) A defendant, whether or not written demand has been made, who intends to offer evidence of an alibi shall, not less than ten days before trial or at such time as the court may allow, file and serve on the prosecuting attorney a notice, in writing, of his intention to claim alibi. The notice shall contain specific information as to the place where the defendant

> claims to have been at the time of the alleged offense and, as particularly as is known to the defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish alibi. The prosecuting attorney, not more than five days after receipt of the list provided herein or at such other time as the court may direct, shall file and serve the defendant with the addresses, as particularly as are known to him, of the witnesses the state proposes to offer to contradict or impeach the defendant's alibi evidence.
>
> (2) The defendant and prosecuting attorney shall be under a continuing duty to disclose the names and addresses of additional witnesses which come to the attention of either party after filing their alibi witness lists.
>
> (3) If a defendant or prosecuting attorney fails to comply with the requirements of this section, the court may exclude evidence offered to establish or rebut alibi. However, the defendant may always testify on his own behalf concerning alibi.
>
> (4) The court may, for good cause shown, waive the requirements of this section.

The statute requires not only that the defendant give notice of a claim of alibi and information regarding witnesses but also requires the State to be under a continuing obligation to provide information to the defense regarding witnesses it intends to call in rebuttal. As a result, Utah Code Ann. §77-14-2 is a balanced statute which is geared toward eliminating surprise.

The requirement of reciprocal discovery by the State saves the statute from a challenge similar to the one successfully argued in Wardius v. Oregon, 412 U.S. 470 (1973). In Wardius, the United States Supreme Court reversed the conviction of an Oregon defendant who had been required to provide notice and discovery of his alibi defense without the State's having been required to give reciprocal notice of its rebuttal to the alibi. The Court stated:

> . . . the State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence he disclosed to the State.

Id. at 475-6.

Consistent with the Wardius court, this Court stated that "[t]he overriding consideration in evaluating any notice-of-alibi claim must be the avoidance of unfair surprise or prejudice to either party, not an exaltation of technical formalities." State v. Ortiz, 712 P.2d 218, 220 (Utah 1985).

In the instant case, the trial court's failure to enforce the reciprocity requirement contained in Utah Code Ann. §77-14-2 (1953 as amended) resulted in unfair surprise or prejudice to Mr. Albretson and effectively denied him due process as guaranteed by Article I, sections 7 and 12 of the Utah Constitution, and the fifth and fourteenth amendments to the federal constitution.

Mr. Albretson filed and served on the State a Notice of Alibi and furnished the names of all alibi witnesses and the necessary information for contacting them. In addition, Ms. Davis, the witness whose testimony was later refuted by the State's surprise rebuttal witness, was known to the State before defense counsel was appointed. She had given a full written statement to the investigating officer prior to appointment of counsel (T. 101, 124). (See Addendum D). The statement was then given to defense counsel in the requisite Reply to Notice of Alibi, filed on July 31,

1987, by the prosecution (R. 49-50). The Reply included the name of the investigative detective who had taken the defense alibi witness' statement and copy of her statement. No other alibi rebuttal witnesses were listed. (See Addendum C).

In our criminal justice system, where prosecution of an individual is by the State, there is inherent inequality to which a requirement of reciprocal alibi discovery is a necessary redress. Recognizing that the State's resources provide an enhanced ability to find and present surprise alibi rebuttal, as contrasted to the defendant's relative lack of ability, the Supreme Court in Wardius stated in a lengthy footnote that any imbalance in discovery rights should work in a defendant's favor. Wardius, 412 U.S. at 476, fn. 9.

In the instant case, the State had continuous investigative access to Ms. Davis. The State also was in possession of Ms. Davis' written statement within a very short time of the defendant's arrest. Thus, the State had weeks to learn of possible witnesses to rebut any aspect of Ms. Davis' statement--one such aspect being the route taken through the canyons. To allow the State to later present a surprise alibi rebuttal witness only exacerbates the imbalance noted by the Wardius court.

Furthermore, circumstances suggest that the State did have information which would have required it to disclose the identity of its alibi rebuttal witness in conformity with Utah Code Ann. §77-14-2.

The prosecution's method of examining Ms. Davis denotes a design to elicit a commitment about the route traveled in

anticipation of the rebuttal. The following is excerpted from the cross-examination of Ms. Davis by the prosecution:

Q. So before you went to the mountains, you went to your mother's?

. . . . .

Q. And from there where did you go?

A. We went up to Parley's Canyon.

Q. Tell me the route, would, you, please?

A. Went up--after I left my mother's shop, we went up into Parley's Canyon, up in through Emigration and back down out of Emigration. We went back to the house, had lunch.

Q. Let me ask you this. You went up Parley's. That's the main freeway?

A. Yes.

Q. And how did you get to Emigration?

A. I took the first exit off the freeway, went down in that way, back up in through Emigration and out.

Q. Is that the East Canyon exit?

A. I believe so.

Q. Where you go over the mountain then you come back Emigration?

A. Yes.

Q. You didn't come back down from Parley's and go up around and come through Emigration Canyon

through the zoo?

A. No.

Q. In fact, when you came back down, you passed the zoo. It was on your left-hand side, I guess.

A. That's right.

. . . . .

Q. Are you sure you went up Parley's Canyon?

A. Yes.

Q. Are you sure you made that little detour over Emigration Canyon?

A. Yes, I am.

Q. You're sure you came back down Emigration Canyon?

A. Yes.

(T. 96-7). If the State was aware of the closure of SR65 before trial and simply waited to confirm the route from the witness before calling an undisclosed rebuttal witness, then the State purposely avoided the disclosure requirement and thwarted the due process requirements of alibi notice.

Utah Code Ann. §77-14-2 provides in subsection (4) that "[t]he court may, for good cause shown, waive the requirements of this section." A survey of the Utah case law dealing with subsection (4) demonstrates adherence to the Wardius court's admonishment against unfair surprise. In State v. Ortiz, 712 P.2d 218, 220 (Utah 1985), the Court pointed out that "[t]he overriding

consideration in evaluating any notice-of-alibi claim must be the avoidance of unfair surprise or prejudice to either party. . . ." In cases where this Court has upheld the waiver of the requirements of the statute (or its predecessor), the opposing party has had actual or implied knowledge of the rebuttal witnesses or their testimony. See State v. Ortiz, 712 P.2d 218 (Utah 1985); State v. Peterson, 681 P.2d 1210 (Utah 1984); State v. Haddenham, 585 P.2d 447 (Utah 1978); and State v. Case, 547 P.2d 221 (Utah 1976).

In the present case, defense counsel had no actual or implied prior knowledge of the rebuttal witness. The surprise alibi rebuttal witness' identity and nature of testimony were only divulged to the defense after it had closed its case (T. 115). Furthermore, the prosecutor offered no grounds for waiving the requirements of the statute (T. 15-124) and the judge made no finding that the State had established good cause for such waiver (T. 124). (See Addendum E for transcript of ruling).

In the instant case, the presentation of a surprise alibi rebuttal witness greatly affected the ability of defense counsel to present her case, to accurately represent Ms. Davis' testimony and to fairly cross-examine the surprise witness in an adequate and informed manner.

In State v. Frye, 581 P.2d 528 (Or. App. 1978), the Court ruled that failure to give the defense notice that a police officer might be called to refute evidence of an alibi constituted reversible error since:

> Had the State complied, defendant would have checked the theory presented by the State's

> rebuttal witness to see whether it was plausible. Defendant might have found a number of defects in the theory, but without the opportunity to check it prior to trial, defendant was left with an inadequate, uninformed cross-examination. The State was given more than ample opportunity to investigate and explore loopholes in defendant's theory. Wardius required defendant be given equal opportunity.

Id. at 530. In the instant case, the surprise rebuttal witness left defense counsel unprepared for informed cross-examination and unable to investigate and explore problems with the witness' testimony. Furthermore, defense counsel was unable to investigate and subpoena witnesses for surrebuttal.

The State's case was based upon an eyewitness identification and subject to all the problems inherent in such cases. (See State v. Long, 721 P.2d 483 (Utah 1986)). The lack of physical evidence left the jury to decide the facts solely upon the credibility of the witnesses. The credibility of defendant's alibi witnesses was therefore of utmost importance to the jury, and in such a case, allowing the testimony of the surprise rebuttal witness was prejudicial error.

The avoidance of unfair surprise or prejudice is the overriding consideration in a notice-of-alibi claim and, in the present case where defendant had no actual or implied knowledge of the State's rebuttal witness or the nature of his testimony, defendant's conviction should be reversed and the case remanded for a new trial.

CONCLUSION

Defendant/Appellant, DOUGLAS R. ALBRETSON, respectfully requests that this Court reverse his conviction and remand the case for a new trial.

Respectfully submitted this 9 day of December, 1988.

DEBRA K. LOY
Attorney for Defendant/Appellant

JOAN C. WATT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that ten copies of the foregoing will be delivered to the Utah Supreme Court, 322 State Capitol, Salt Lake City, Utah 84114 and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114 this _____ day of December, 1988.

JOAN C. WATT

DELIVERED by _____

this _____ day of December, 1988.

ADDENDUM A

DEBRA K. LOY, (#3901)
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOC.
333 South Second East
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff v.	:	NOTICE OF INTENT TO RELY ON THE DEFENSE OF ALIBI
DOUGLAS R. ALBRETSEN, Defendant	:	Case No. CR87-810 HONORABLE RAYMOND S. UNO

Pursuant to the provisions of Utah Code Ann. §77-14-2 (1953 as amended), the defendant, DOUGLAS R. ALBRETSEN, by and through his attorney of record, DEBRA K. LOY, herein gives to the Salt Lake County Attorney's Office and to the Court notice that he intends to claim the defense of alibi.

The defendant intends to call the following witnesses for the purpose of establishing his alibi:

1. BRENDA DAVIS, 616 East 7th South, Salt Lake City, Utah
2. Cindy Edwards, (Address Unknown)

RESPECTFULLY SUBMITTED this 22 day ~~May~~ July, 1987.

Debra K. Loy

DEBRA K. LOY
Attorney for Defendant

DELIVERED a copy of the foregoing to the County Attorney's Office, 231 East Fourth South, Salt Lake City, Utah this ___ day of July, 1987.

JUL 22 1987

ADDENDUM B

DEBRA K. LOY, (#3901)
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOC.
333 South Second East
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff v.	:	AMENDED NOTICE OF INTENT TO RELY ON THE DEFENSE OF ALIBI
DOUGLAS R. ALBRETSEN, Defendant	:	Case No. CR87-810 HONORABLE RAYMOND S. UNO

Pursuant to the provisions of Utah Code Ann. §77-14-2 (1953 as amended), the defendant, DOUGLAS R. ALBRETSEN, by and through his attorney of record, DEBRA K. LOY, herein gives to the Salt Lake County Attorney's Office and to the Court notice that he intends to claim the defense of alibi.

The defendant intends to call the following witnesses for the purpose of establishing his alibi:

1. BRENDA DAVIS, 1022 1/2 South 800 East, Salt Lake City, Utah

2. Cindy Edwards, (Address Unknown)

RESPECTFULLY SUBMITTED this 27 day July, 1987.

Debra K Loy
DEBRA K. LOY
Attorney for Defendant

DELIVERED a copy of the foregoing to the County Attorney's Office, 231 East Fourth South, Salt Lake City, Utah this 27 day of

ADDENDUM C

DAVID E. YOCOM
Salt Lake County Attorney
ROBERT L. STOTT
Deputy County Attorney
231 East 400 South, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 363-7900

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. DOUGLAS R. ALBRETSEN, Defendant.	REPLY TO NOTICE OF ALIBI Case No. CR 87-810 Honorable Raymond S. Uno

COMES NOW the State of Utah, by and through Deputy County Attorney, ROBERT L. STOTT, and informs the defendant, DOUGLAS R. ALBRETSEN, that in response to his Notice of Alibi, the State proposes to offer the following witness:

1. Officer Brandt Hutchison
   Salt Lake City Police Department

RESPECTFULLY SUBMITTED this 30th day of July, 1987.

ROBERT L. STOTT
Deputy County Attorney

CERTIFICATE OF MAILING

I hereby certify that on this 31st day of July, 1987, I mailed a true and correct copy of the foregoing Reply to Notice of Alibi to DEBRA K. LOY, Attorney for Defendant, at the address stated below.

Secretary

DEBRA K. LOY
Attorney for the Defendant
Salt Lake Legal Defender Association
333 South Second East
Salt Lake City, Utah 84111

sc/0058d/72605

ADDENDUM D

S.L.C.P.D.

5-27-87

I Brenda Davis on May 11, 1987 and we took my mother's day Card and Buthday Card and candy to her. We pick my son up on 11:00 am from school from 800 East and 400 So. my son's name is Randy. Gone up into the mountain for a ride, into to Parley Way and Emmigration Canyon. Gone home around 12:30 p.m. to 1:00 p.m. for lunch, eat lunch's and we left again whe out by Great Salt Lake, and out by Lake back in to Salt Lake. Had gone over to Peggy's house to see if she had Douglas nu that they owed him. Came back to the house and call my girlfriend to see if she would like to come for Dinner and she said yes. We ate dinner about 5:30 to 6:00 p.m. a we watched some T.V. and we talked about alot of things. Douglas never I my side at all. He was with me every pla I went to. I love Douglas and I'm going to help him in every way I can help him. You people are wrong about him. He didn't do this I know that he didn't do it.

Thank You
Brenda Davis
5-27-87

12-14-58
612 E. 700 So.
595-1138

ADDENDUM E

its being open or not, you would have been aware that issue might arise today.

MR. STOTT: It doesn't matter whether I am aware of an issue or not. The question is what was available. She had what I had. I don't have to go talk to a witness 17 times or 18 times. The police talked to that witness and had a statement that is in verbatim what she testified to on the stand. No changes, no difference, no indication what her route was. It's not my duty to go up and check every little thing and then give it to the defense.

I gave the witnesses, I gave the statement, and it wasn't until she got on the stand that I was able to ask the question and found out what route she took.

MS. LOY: For the record, it was not a verbatim statement. The main points were all raised.

THE COURT: Based upon what has been represented, the Court is going to deny the motion to have this witness excluded as far as the testimony is concerned, and we may have to see what he has got to say. Maybe there's another route they can go around. I don't know. I don't go up that way.

MS. LOY: Thank you. I will need just a minute.

[Whereupon, the following proceedings were had in open court in the presence of the jury:]